

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : NOTICE OF MOTION
-against- : 15 CR 607 (WHP)
JAMES CAPERS, :
Defendant, :
-----x

PLEASE TAKE NOTICE, that the defendant James Capers, by his attorneys, Andrew G. Patel and Esere Onaodowan, and upon the annexed declaration and all papers and proceedings in this case, moves the Court, before the Honorable William H. Pauley, in the United States District Court for the Southern District of New York, for Orders:

- A. Suppressing identification evidence, pursuant to Rule 12(b)(3)(c) of the Federal Rules of Criminal Procedure on the grounds that such evidence was obtained in violation of Mr. Capers' right to Due Process of law;
- B. Permitting Mr. Capers to join motions filed by the co-defendants in this matter.
- C. Any such other and further relief as this Court deems appropriate.

Dated: New York, New York
July 6, 2016

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To: All Counsel via ECF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA, :

-against- : AFFIRMATION OF
 : ESERE J. ONAODOWAN
 :
 : 15 Cr. 607 (WHP)
JAMES CAPERS, :
 Defendant, :
-----x

I, ESERE J. ONAODOWAN, ESQ under penalties of perjury pursuant to 28 U.S.C. Sec 1746, affirms as follows:

1. I am the co-counsel for JAMES CAPERS, a defendant herein. I am a member of the Bar of this Court and my office is located at 116 West 23rd Street, 5th Fl, New York, NY 10011.
2. I make this Declaration in support of defendant JAMES CAPERS' motion for an Order granting various forms of relief.
3. This Declaration is made on information and belief which is based on a review of the discovery material provided by the Government pursuant to Rule 16 of the Federal Rules of Criminal Procedure and conversations Assistant United States Attorneys assigned to this matter.
4. The Government has provided a copy of a one page photo array which contains six photographs on it as the photo array. A copy of the photo array is attached as Exhibit A.
5. The Government has also provided a copy of a New York City Police Department

Photo Array Viewing Report dated March 7, 2016. The copy of the report provided by the Government is heavily redacted. A copy of the March 7, 2016 Photo Array Viewing Report is attached as Exhibit B.

6. Due to the extent of the redactions to the Photo Array Viewing Report it is impossible to determine what the witness said or what was said to the witness by the law enforcement officer(s) present at viewing of the photo array.
7. As part of the Rule 16 discovery in this matter, the Government produced an NYPD Wanted Poster featuring James Capers as the wanted person. A copy of the wanted poster is attached as Exhibit C.

WHEREFORE, it is respectfully requested that this Court enter an Order granting the relief requested in the Notice of Motion and/or Ordering a pre-trial hearing which it is respectfully submitted is required to resolve this issue and grant such other, further and different relief as this Court may deem just, equitable and proper.

Dated: New York, New York
July 6, 2017

Respectfully submitted,

/s/Esere Onaodowan
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Exhibit A



Photo Array 340855



1 _____

2 _____

3 _____



4 _____

5 _____

6 _____

Identification Made:



Yes



No

Photo Selected:

Date of Identification Procedure:

Exhibit B

**PART A - SHOWING THE PHOTO ARRAY**

Witness Name		Administrator	Date
		DT3 OSCAR RIVAS	3/7/16
Interpreter Used?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Name of Interpreter	Command
		N/A	N/A
If Interpreter is Not a Member of the Service, List Name, Address and Telephone No. N/A			

List any Additional Members of the Service Present:

Rank/Name	Tax No.	Cmd.	Rank/Name	Tax No.	Cmd.
Det. Gorgley		NB30			

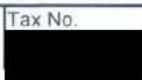
Instructions to the Administrator Showing the Photo Array:

- Remain neutral. Do not comment on the identification before, during or after the identification procedure.
- Place the photo array in a closed letter-size manila folder when handing it to the witness.
- Stand out of the witness' line of sight, where practical, but still observe the witness as the witness views the photo array.
- So as not to distract the witness, do not comment during identification procedure.

PART B - AFTER THE WITNESS HAS VIEWED THE ARRAY, ASK THESE QUESTIONSDid you recognize anyone in the photo array? YesIf so, what is the number of the person that you recognize? 5From where do you recognize that person?
Record words and gestures of the witness:


If the Witness Gives a Vague Answer (for example: "I think it is..." or "It might be...")

Then say the following: You said What do you mean by that? (record the witness answer)
Date: 3/7/16 Time: 1625 hrs Witness Signature **FINAL INSTRUCTION TO WITNESS:***Do not discuss with any other witness what you observed or said during this identification procedure.*

Prepared by (Rank, Name Printed) DT3 OSCAR RIVAS	Tax No. 	Cmd. 	Date Prepared <u>3/7/16</u>
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**THIS FORM MUST NOT BE SHOWN TO THE WITNESS****ADMINISTRATOR TO FILL OUT THE AREA BELOW****The Photo Array:**

- The original photo array MUST be preserved.
- Attach a copy of the photo array to this form and provide the information below, if available.

Position	Name	NYSID Number	Date of Photo
1			03/03/2016
2			03/03/2016
3			03/02/2016
4			03/02/2016
5	CAPERS, JAMES	09593467K	07/16/2015
6			03/01/2016

Suspect's Name

CAPERS, JAMES

Date of Birth

04/03/1993

Suspect's Position in the Photo Array

5

Was any photo altered?

 Yes No

If Yes, which photo?

Describe alteration

Comments:

Signature of Administrator

3/7/16

Date

Prepared by (Rank, Name Printed)

DT3 OSCAR RIVAS

Tax No.

Cmd.

730

Date Prepared

3/7/16

Exhibit C



POLICE DEPARTMENT
CITY OF NEW YORK

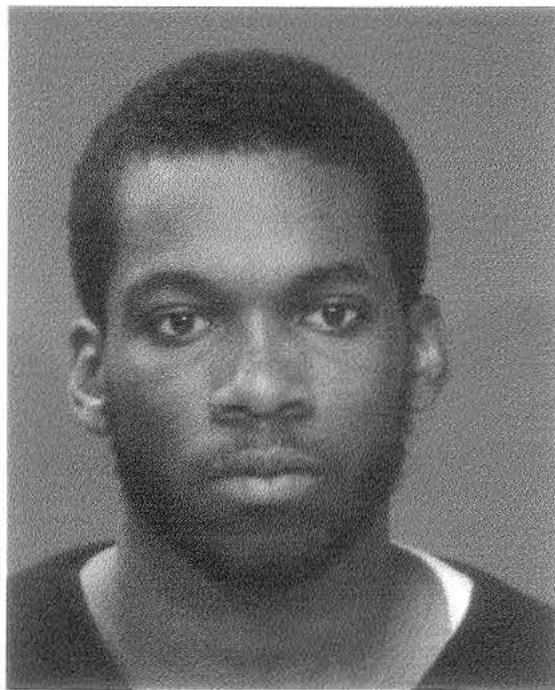
DETECTIVE BUREAU
Wanted Flyer # 23488086

POLICE DEPARTMENT
CITY OF NEW YORK



WANTED FOR HOMICIDE

PERPETRATOR - PROBABLE CAUSE TO ARREST



JAMES CAPERS / MALE / BLACK / 22 YEARS OF AGE DOB: [REDACTED]

HEIGHT 5' 9", WEIGHT 190 lbs., HAIR BLACK, EYES BROWN

LAST KNOWN ADDRESS: [REDACTED]

On July 7, 2015 at approximately 1320hrs the above subject did discharge a firearm in the vicinity of 1531 Taylor Avenue causing the death of the victim Mr. Allan Mcqueen. Please be advised the subject is considered armed and dangerous.

Anyone with information regarding the above subject , please notify Det. PEDRO RAMOS at [REDACTED]
OR Detective Borough Bronx at [REDACTED]

Investigator: Det. PEDRO RAMOS **Command Assigned:** 266-43 DET SQUAD
Case# 2015-1830 **Complaint Report#** 2015-043-07260

Do Not Distribute to Non-Law Enforcement Personnel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA, : MEMORANDUM OF LAW
-against- :
: 15 Cr. 607 (WHP)
JAMES CAPERS, :
Defendant, :
-----x

PRELIMINARY STATEMENT

Defendant James Capers respectfully submits this memorandum of law in support of his motion to suppress identification evidence and for an Order permitting Mr. Capers to join the motions filed on behalf of his co-defendants. The pretrial identification of Mr. Capers should be suppressed as unduly suggestive and unreliable.

FACTUAL BACKGROUND

Mr. Capers is charged in six Counts of a six Count indictment that alleges that Mr. Capers was a member of a racketeering enterprise (Count One), a member of a narcotics conspiracy (Count Two), that on or about July 7, 2015, he participated in the murder of Allen McQueen (Counts Three and Four) and that Mr. Capers used and carried weapons in relation to crimes charged in the indictment (Count Five and Six).

The Government alleges that Mr. McQueen was shot and killed on July 7, 2015, in the Bronx, New York. Mr. Capers was arrested on July 15, 2015 at 3:45pm inside the 43rd precinct which is located the Bronx.

According to the discovery provided by the Government pursuant to Rule 16 of the Federal Rules of Criminal Procedure, Mr. Capers was placed in two lineups on July 15, 2015, the day he was arrested. Mr. Capers was not identified in either lineup. One of the people who

viewed the lineup, identified someone other than Mr. Capers as a participant in the crime. The other witness that viewed a lineup that same day, failed to make any identification.

On July 16, 2015, a photograph of Mr. Capers was taken at the 43rd Precinct. On March 7, 2016, approximately 8 months later, that photograph was used in a photo array labeled NYPD Photo Array 340855 (Photo Array) attached as Exhibit A to the Onaodowan Affirmation. On March 7, 2016, Mr. Capers was identified by an individual who had viewed a six photo array in connection with the investigation of the Allen McQueen murder.

ARGUMENT

I. THE PRETRIAL IDENTIFICATION OF MR. CAPERS SHOULD BE SUPPRESSED BECAUSE THE PHOTO ARRAY WAS UNDULY SUGGESTIVE

Due Process requires that identification testimony that is the product of unnecessarily suggestive law enforcement procedures must be suppressed. *See Manson v. Brathwaite*, 42 U.S. 98, 114 (1997). “When the defendant objects to identification testimony to be given by a witness who has identified him prior to trial, a sequential inquiry is required in order to determine whether either the prior identification or an in-court identification of the defendant at trial is admissible. The Court must first determine whether the pretrial identification procedures unduly and unnecessarily suggested that the defendant was the perpetrator.” *Raheem v. Kelly*, 257 F.3d 122, 133 (2d Cir. 2001); *United States v. Perez*, 248 F. Supp. 2d 111, 113 (D. Conn. 2003), *See also United States v. Tortora*, 30 F.3d 334, 338 (2d Cir.1994).

Mr. Capers is objecting to the identification testimony that will be offered by the witness who identified him in the photo array on March 7, 2016. The Second Circuit in *Raheem v. Kelly* has established that where such an objection is made by the defendant, an inquiry is required. Defendant is respectfully requesting the opportunity to perform such an inquiry via an

identification suppression hearing in order to determine the admissibility of the pretrial photo array identification. “The ultimate question of the constitutionality of pretrial identification procedures is a mixed question of fact and law... *Sumner v. Mata*, 455 U.S. at 597, 102 S.Ct. at 1306.” *Jarrett v. Headley*, 802 F.2d 34, 42 (2d Cir. 1986). In order to make a finding of fact and law as to the constitutionality of the pretrial identification procedure of Mr. Capers, we would ask that this Court grant an evidentiary hearing. *United States v. Wade*, 388 U.S. 218 (1967).

“The fairness of a photographic array depends on a number of factors, including the size of the array, the manner of presentation by the officers, and the array's contents. If there is nothing inherently prejudicial about the presentation, such as use of a very small number of photographs or of suggestive comments, the “principal question is whether the picture of the accused, matching descriptions given by the witness, so stood out from all of the other photographs as to ‘suggest to an identifying witness that [that person] was more likely to be the culprit.’ ” *Jarrett v. Headley*, 802 F.2d at 41 (quoting *United States v. Archibald*, 734 F.2d 938, 940 (2d Cir.1984)).” *United States v. Maldonado-Rivera*, 922 F.2d 934, 974 (2d Cir. 1990)

In the instant case Mr. Capers is number 5 out of only a six image Photo Array. Mr. Capers’ photograph is one of six color images on one sheet of paper that was presented to the witness in the March 7, 2016. The use of only six photographs in a photo array is a very small number of photographs. The presentation of this very small number of photographs on one sheet of paper is inherently prejudicial.

In addition to assessing such factors as the size of the photographic array, the Court must also consider the manner of presentation by the officers, including possibly suggestive comments. *United States v. Maldonado-Rivera*, 922 F.2d 934, 974 (2d Cir. 1990) In this case

the Government has produced no information concerning the manner the photo array was conducted or presented by the officers.

The Photo Array Viewing Report, (attached as Exhibit B to the Onaodowan Affirmation) there are a few sections where the officer must write down the verbal exchange between the witness and the administrating officer should the witness give a “vague answer”. The written verbal exchange between the witness and the administrating officer during the photo array procedure on March 7, 2016 was redacted from the Photo Array Viewing Report. This Court can not properly find if any of the comments made during the photo array were suggestive absent an evidentiary hearing.

“A photographic array used to identify a criminal suspect is suggestive if “the picture of the accused, matching descriptions given by the witness, so stood out from all of the other photographs as to suggest to an identifying witness that that person was more likely to be the culprit.” *United States v. McGee*, No. 99-CR-150E, 2000 WL 1520957, at *2 (W.D.N.Y. Oct. 10, 2000). While we do not know nor do we have any prior descriptions by witnesses of the Photo Array is still unduly suggestive because Mr. Capers’ photograph so stood out from all the other photographs as to suggest to the identifying witness that he was the culprit. In the Photo Array, every other suspect’s photograph was taken in March 2016, as indicated on the Photo Array Information Report. Mr. Capers’ photo was taken in July 2015 as indicated on the Photo Array Information Report. In the photos, every other suspect is dressed for cold weather while Mr. Capers is obviously dressed for warmer weather. Suspects 1 through 4 are all wearing hooded sweatshirts. Suspect 6 is wearing an obvious long sleeved thermal styled shirt with a visible undershirt. Mr. Capers, however, is the only suspect dressed in what is obviously a V neck t-

shirt. If any previous description was given by a witness, we do not know whether the description given described the suspect as wearing a black V-neck T-shirt.

In *Hylton v. Ercole*, No. 05-CV-4077 (NGG), 2010 WL 2594744, at *11 (E.D.N.Y. June 23, 2010) , the Court states “At the first step of the due process analysis, the Appellate Division correctly found that Hylton's lineup was unduly suggestive under clearly established federal law.” *Hylton v. Ercole*, No. 05-CV-4077 (NGG), 2010 WL 2594744, at *11 (E.D.N.Y. June 23, 2010) “And, according to the Appellate Division, Hylton was the only lineup participant who wore beige.” *Hylton v. Ercole*, No. 05-CV-4077 (NGG), 2010 WL 2594744, at *11 (E.D.N.Y. June 23, 2010) While *Hylton v. Ercole* discussed the unduly suggestiveness of Mr. Hylton’s attire in the lineup procedure, the reasoning used by the *Hylton* Court to reach that conclusion can also be applied to Mr. Capers’ photo array procedure. Just as in the *Hylton* case, Mr. Capers was the only person in the Photo Array that was dressed differently, specifically dressed for warmer weather in a V neck t-shirt. The alleged crime took place in the middle of the summer. Mr. Capers photograph stood out from all the other photographs as to suggest to the identifying witness that he was the culprit.

“In *United States v. Fernandez*, 456 F.2d 638, 641–42 (2d Cir.1972), in which surveillance photographs showed a robber to be a light-skinned individual with an Afro haircut, we held that the use of a six-photo array where only one of the six even “remotely resemble[d]” that description was impermissibly suggestive. But we noted that if that array had been combined with another five-photo array that included one other light-skinned Black man with an Afro, the resulting 11–photo array with two persons matching the robber’s characteristics would not have been impermissibly suggestive.” *United States v. Maldonado-Rivera*, 922 F.2d 934, 974 (2d Cir. 1990). In the Photo Array, Mr. Capers has the darkest complexion out of the six photographed

suspects. Just as in the Maldonado-Rivera case, Mr. Capers' photograph was amongst a six person photo array and his skin tone stood out amongst the other five suspects. The other five suspects had brown skin while Mr. Capers had very dark skin. Accordingly, the Photo Array used to identify Mr. Capers was impermissibly suggestive.

II. THE PRETRIAL IDENTIFICATION OF MR. CAPERS SHOULD BE SUPPRESSED BECAUSE IT WAS UNRELIABLE GIVEN THE SUGGESTIVENESS OF THE PRESENTATION

When assessing reliability, the Court has to consider a variety of factors, including "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *United States v. Thai*, 29 F.3d 785, 808 (2nd Cir. 1994) (quoting *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)). The Second Circuit in *Thai* instructs that these factors must also be evaluated in light of the totality of the circumstances.

As previously discussed, the Government has not supplied us with any information as to the comments that were made during the photo array. The Government has also failed to supply us with whatever descriptions they received from witnesses. The murder of Allen McQueen took place on July 7, 2015. This photo array identification took place on March 7, 2016. The length of time between the crime and the identification procedure is eight months. In the Photo Array Viewing Report, it indicates that there are words and gestures made by the witness during the identification procedure, however the record of those words and gestures were redacted upon discovery production. The Photo Array Viewing Report, indicates that a vague answer was

given by the identifying witness, prompting the administrating officer to then make a comment, but the record of the vague answer and the officer's response were also redacted.

The Government also provided a Wanted Poster featuring Mr. Capers wearing what appears to be the exact shirt as he is wearing in the Photo Array photograph. The photograph in the Wanted Poster appears to be an enlarged copy of the same photograph of Mr. Capers that was used in the Photo Array. While it is unclear as to when the Wanted Poster was created or where it was disseminated, it does provide Mr. Capers' name, age, and physical description.

The date and breath of the dissemination of the Wanted Poster is another potential source of taint of the witness's identification of Mr. Capers. There is no way to determine just by looking at the Wanted Poster how many people have seen it. A hearing is necessary for the Court to properly examine the totality of these circumstances surrounding the photo array procedure before making a determination as to the reliability of the identification.

It is respectfully submitted that the Photo Array is intrinsically suggestive, that the conduct of the viewing of the photo array must be shown to comport with the requirements of Due Process and that the dissemination of a Wanted Poster is a source of potential taint of the identification of Mr. Capers. We respectfully submit that a hearing is necessary to examine the fairness of the array, the suggestiveness of the presentation, and the reliability of the identification.

Join Motions Filed by Co-defendants

Mr. Capers respectfully requests that he be permitted to join the motions filed by all co-defendants that are not inconsistent with the relief sought herein. This request is made to preserve judicial resources and to avoid unnecessary duplication of efforts.

Conclusion

For the foregoing reasons, the defendant respectfully requests this Court to enter an Order granting the relief sought herein. Specifically, it is respectfully requested that a pre-trial hearing be ordered on this issue and granting such other and further relief as this Court may deem to be just and reasonable.

Dated: New York, New York
 July 6, 2017

Respectfully submitted,

/s/Esere Onaodowan
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